IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-676

STEVEN LYLE CRAIG,
Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF FOR RESPONDENT IN OPPOSITION

INTRODUCTORY STATEMENT

The respondent accepts the petitioner's statements as to jurisdiction, date of judgment and time of entry, date of order granting an extension of time to file the petition for writ of certiorari, and statutes and constitutional provisions involved. The opinion below is appended to the petition and the unofficial citation is 498 P.2d 942 (Colo. 1972). The respondent desires to restate the questions presented and the statement of the case. References to the record will be by folio number (f. or ff.).

QUESTIONS PRESENTED

1. Was petitioner's right to trial by a fair and impartial jury violated by excluding veniremen who stated that their objections to capital punishment would interfere with their duties as jurors in determining petitioner's culpability or penalty when life imprisonment was the sentence imposed by the jury?

2. Was petitioner's right to trial by a fair and impartial jury violated when the array was selected solely from the list of registered voters?

STATEMENT OF THE CASE

Petitioner was charged with murder and conspiracy to commit murder in the District Court of El Paso County, Colorado (ff. 3-5). To these charges pleas of not guilty were entered (ff. 36-37).

Prior to trial, petitioner moved to quash the array, alleging a denial of equal protection of the laws in the selection of the veniremen solely from the list of registered voters of El Paso County (ff. 104-106, 227, 234-238). The motion was denied (ff. 104-106, 224-225).

During *voir dire* seventeen prospective jurors were successfully challenged for cause over objection of Craig's trial counsel for their inability to subordinate their views opposing capital punishment in determining petitioner's culpability or punishment (ff. 277-278, 283, 285-286, 773, 818, 823, 829, 920-924, 1057-1059, 1143-1145, 1231-1234, 1333-1334, 1369-1373, 1540-1543, 1626-1629, 1717-1719, 1752-1754). One venireman was challenged for cause without objection by the people for his inability to impose only the

death penalty if Craig was convicted (ff. 1596-1598). The jury was sworn after petitioner had exhausted all his peremptory challenges (ff. 1803-1804).

Verdicts of guilty to first degree murder and conspiracy to commit murder were returned and the jury set petitioner's punishment at life imprisonment (ff. 166-168, 3207-3213).

ARGUMENT

I

THE COMPOSITION OF THE JURY DID NOT DENY PETITIONER A FAIR AND IMPARTIAL REPRESENTATIVE JURY AND THE SELECTION PROCESS DID NOT VIOLATE THE STANDARDS OF WITHERSPOON V. ILLINOIS.

Jurors selected at petitioner's trial were selected in meticulous compliance with the specific requirements of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). No venireman was required to stand aside simply on the basis of his scruples against the death penalty. Each was questioned specifically as to his ability to serve as a juror in this case. Only those who indicated that their scruples would interfere with their ability to determine culpability or who could not subordinate their views in arriving at an appropriate punishment were excused. The *Witherspoon* rule has been the rule of Colorado almost from its admission into the union. *Stratton v. People*, 5 Colo. 276 (1880).

Data is presented by petitioner to establish that a jury selected as this jury was and composed of those who oppose the ultimate punishment is more prone to convict

than a jury consisting of those who were excluded.[1] The respondent submits that this evidence is not substantial or sufficient to reverse the conviction in the case at bar.

Further, the respondent submits that this case is controlled not by *Witherspoon, supra*, but by *Bumper v. North Carolina*, 391 U.S. 543 (1968).

Craig would have this Court now hold that these veniremen were arbitrarily excluded because of the recent decision of *Furman v. Georgia*, 92 S.Ct. 2726 (1972). Assuming arguendo the premise posited by petitioner's counsel that this Court has ruled unconstitutional the death penalty, the conclusion reached does not necessarily follow. *Furman* was decided on June 29, 1972, while trial in the present case was in May, 1970 (ff. 104-106). Respondent submits that Furman v. Georgia is not retroactive in application as to jury selection in capital cases.

This Court rejected the concept that new interpretations of the Constitution must be construed as always having been the law, disregarding or ignoring previous interpretations as if they never existed. *Williams v. United States*, 401 U.S. 646 (1971) and *Linkletter v. Walker*, 381 U.S. 618 (1965).

Criteria for determining whether new interpretations of the Constitution must be applied prospectively only, or retroactively as well, were specified in *Stovall, v. Denno*, 388 U.S. 293, 297 (1967). The criteria include the purpose of the new standards, reliance by law enforcement officials

[1] The data presented is two law review articles — Bronson, *On the Conviction Proneness and Representativeness of a Death Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. Colo. L. Rev. 1 (1970) and Jurou, *New Data on the Effect of a Death Qualified Jury on the Guilt Determination Process*, 84 Harv. L. Rev. 567 (1971).

on the old standards, and the effect on the administration of justice. See also *Desist v. United States*, 394 U.S. 244, 249 (1969).

If petitioner prevails in his contention that *Furman* requires reversal of his conviction, the effect on the administration of justice would be vast. Not only would all defendants who have been sentenced to execution be entitled to new trials but those who did not receive the ultimate punishment would have to be given new trials. This might even include those who were charged with capital crimes but pleaded guilty or were convicted of lesser included crimes. In many of these new trials, convictions would be impossible for lack of witnesses, waning memories, prohibitive costs, etc.

In many of these situations, the trial courts and prosecuting attorneys relied on this Court's decision in *Witherspoon, supra,* and *Bumper, supra,* in conducting these trials. Assuming arguendo that this Court's holding in *Furman v. Georgia, supra,* declared the death penalty to be unconstitutional the purpose of the decision would be to eliminate the death penalty as a constitutionally permissible punishment and not to grant new trials to all capital defendants.

The overriding factor that must be considered in determining whether a decision should be applied in a retroactive manner is its effect on the fact finding process. *Williams v. United States, supra; Johnson v. New Jersey,* 384 U.S. 719 (1966); and *Linkletter v. Walker, supra.* The people of the State of Colorado submit that this manner of selecting a jury does not affect the fact finding process. In *Furman v. Georgia, supra,* only the punishment was re-

versed and not the culpability of those petitioners. Again in *Witherspoon* and *Bumper* the Court refused to overturn the guilty verdicts but would not allow execution. It cannot be said that the integrity of the fact finding process has been violated or that the state has crossed the line of neutrality in the selection of this jury.

II

THE ARRAY BEING COMPOSED OF ONLY REGISTERED VOTERS DID NOT DEPRIVE PETITIONER OF A FAIR, IMPARTIAL, AND REPRESENTATIVE JURY.

Petitioner would have this Court declare jury lists assembled from the list of registered voters unfair and nonrepresentative *per se*. It is Craig's position that no prejudice must be shown. There has been no showing made that the jury list used at petitioner's trial did not produce a jury which was a reasonable cross-section of the community. Without such a showing petitioner cannot assert this as a ground for a grant of certiorari.

This Court stated in *Carter v. Jury Commission of Greene County*, 396 U.S. 320, 332 (1970) citing *Brown v. Allen*, 344 U.S. 443, 474 (1953):

> Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty.

Many federal and state courts have held that the use

of lists of registered voters to prepare jury lists is proper unless there is a showing that some group or groups are excluded utilizing this method. See for example: *United States v. James*, 453 F.2d 27 (9th Cir. 1971); *United States v. Parker*, 428 F.2d 488 (9th Cir. 1970), *cert. denied*, 400 U.S. 910 (1970); *United States v. Dangler*, 422 F.2d 344 (5th Cir. 1970); *United States v. Butera*, 420 F.2d 564 (1st Cir. 1970); *Kemp v. United States*, 415 F.2d 1185 (5th Cir. 1969), *reh. denied*, 419 F.2d 383 (5th Cir. 1969), *cert. denied*, 397 U.S. 969 (1970); *Camp v. United States*, 413 F.2d 419 (5th Cir. 1969), *cert. denied*, 396 U.S. 968 (1969); *Simmons v. United States*, 406 F.2d 456 (5th Cir. 1969), *cert. denied*, 395 U.S. 982 (1969), *reh. denied*, 396 U.S. 871 (1969); *United States v. Caci*, 401 F.2d 664 (2d Cir. 1968), *cert. denied*, 394 U.S. 917 (1969); *Nolan v. United States*, 395 F.2d 283 (5th Cir. 1968); *Grimes v. United States*, 391 F.2d 709 (5th Cir. 1968), *cert. denied*, 393 U.S. 825 (1968); *United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965); *People v. Sirhan*, 7 Cal. 3d 369, 497 P.2d 1121, 102 Cal. Rptr. 385 (1972); *Johnson v. Caldwell*, 228 Ga. 776, 187 S. E. 2d 844 (1972); *State v. Curry*, 262 La. 280, 263 So. 2d 36 (1972); *People v. Sinclair*, 30 Mich. App. 473, 186 N. W. 2d 767 (1971); *State ex rel. Bush v. Tahash*, 281 Minn. 244, 161 N. W. 2d 326 (1968); *State v. Parker*, 462 S. W. 2d 737 (Mo. 1971); *State v. Casados*, 188 Neb. 91, 195 N. W. 2d 210 (1972); *State v. Smith*, 102 N. J. Super., 325, 246 A. 2d 35 (1968); and *State v. Zdiarstek*, 53 Wis. 2d 776, 193 N. W. 2d 833 (1972).

There is nothing inherently discriminatory in the use of poll lists in preparing jury lists. If a showing of prejudice is made, then such lists should be discarded or supplemented, but no such showing was made here.

CONCLUSION

Therefore, the respondent urges this Court to deny the petition for a writ of certiorari. The arguments presented show conclusively that the decision of the Colorado Supreme Court was correct and should not be disturbed.

Respectfully submitted,

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